

**COURT OF APPEALS
DECISION
DATED AND FILED**

May 23, 2019

Sheila T. Reiff
Clerk of Court of Appeals

NOTICE

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2018AP316-CR

Cir. Ct. No. 2014CF3846

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

SYED K. RIZVI,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: FREDERICK C. ROSA, Judge. *Affirmed.*

Before Lundsten, P.J., Blanchard, and Fitzpatrick, JJ.

Per curiam opinions may not be cited in any court of this state as precedent or authority, except for the limited purposes specified in WIS. STAT. RULE 809.23(3).

¶1 PER CURIAM. Syed Rizvi appeals a judgment convicting him of first degree reckless injury and aggravated battery, as a party to the crime in each instance. Rizvi also appeals the circuit court's order denying both his post-conviction motion to set aside the judgment and his motion to modify the sentence. Rizvi argues that the circuit court erred in rejecting, without an evidentiary hearing, Rizvi's post-conviction claim that Rizvi's trial counsel was ineffective for failing to call a witness who averred, after trial, to facts that contradict part of the testimony of a key witness called by the State. We reject this argument because Rizvi fails to allege facts that, if true, show that he was prejudiced by failure of his counsel to call the witness.

¶2 Rizvi also argues that the court erred in denying his sentence modification motion, which involves an alleged disparity between the sentences given to Rizvi and another individual. We reject this argument on the ground that Rizvi fails to show that the sentence given to the other individual was highly relevant to Rizvi's sentence. Accordingly, we affirm.

BACKGROUND

¶3 Rizvi, then the owner and manager of a convenience store, was charged in an amended criminal complaint with committing three offenses that targeted T.D., a former employee of Rizvi's at the time of the offenses. The complaint alleged that on August 13, 2014, Rizvi committed, as a party to the crime and using a dangerous weapon, the following: attempted first degree intentional homicide in violation of WIS. STAT. § 940.01(1)(a) (2017-18);¹ first

¹ All references to the Wisconsin Statutes are to the 2017-18 version unless otherwise noted.

degree reckless injury in violation of WIS. STAT. § 940.23(1)(a); and aggravated battery causing great bodily harm with intent to cause great bodily harm in violation of WIS. STAT. § 940.19(4). *See also* WIS. STAT. §§ 939.05, 939.63(1).

¶4 The allegations in the complaint were based on statements given by an employee of the store, Sherrone Thornton, and by T.D. Both Thornton and T.D. told a detective that Rizvi, with the assistance of another employee, Devonte Williams, had participated in a beating of T.D., delivered in a back room of the store. According to T.D., the beating by Rizvi and Williams allegedly included Rizvi using a gun to strike T.D. in the head. According to both accounts, immediately after the beating, Rizvi and Williams took T.D. behind the store, where Rizvi shot T.D. in the head, resulting in severe but non-fatal injuries.

¶5 Witnesses at trial included T.D., Thornton, the detective who took their statements, and Rizvi, but not Williams. The detective's testimony included, without contemporaneous objection by the defense, relating the substance of T.D.'s prior, out-of-court statement to the detective. The State argued to the jury that T.D.'s statement to the detective and Thornton's testimony reinforced each other in describing Rizvi's participation in T.D.'s beating and Rizvi's shooting of T.D.

¶6 The theory of the defense expressed in the closing argument was that Rizvi was not involved in the beating or shooting of T.D., and that instead Thornton was responsible for both. More specifically, defense counsel argued that Thornton successfully deceived the detective about Rizvi's conduct and the detective then convinced T.D., who was not thinking clearly due to his injuries, to accept Thornton's false version of events.

¶7 The jury acquitted Rizvi of attempted homicide, but found him guilty of reckless injury and aggravated battery, both as a party to the crime. The jury further found that Rizvi had used a dangerous weapon in committing both the reckless injury and aggravated battery.

¶8 Rizvi moved post-conviction to set aside the judgment based on allegedly ineffective assistance of trial counsel. Rizvi argued that his counsel was ineffective for failing to call as a witness Robert Owens, who like Thornton and Williams was an employee of Rizvi's at the time of the beating and shooting. Rizvi argued that Owens' potential testimony would have undermined Thornton's credibility. Rizvi also argued that trial counsel was ineffective in failing to "effectively" cross-examine the detective about the allegedly premature acceptance by police of Thornton's version of events without following up with Owens concerning details that Owens would have refuted. Rizvi supported these Owens-related arguments with an affidavit from Owens.

¶9 The court denied Rizvi's post-conviction motion without a hearing. The court concluded that Owen's averments, if testified to and accepted by the jury at trial, would at most have had a limited effect on Thornton's credibility, and the limited effect would have been outweighed by Rizvi's lack of credibility and by T.D.'s consistent identification of Rizvi as one of the individuals who beat him.

¶10 In the alternative, Rizvi requested sentence modification based in pertinent part on the following alleged new factor relating to his sentence: in a separate case, Williams received a less severe sentence than Rizvi for Williams' role in T.D.'s beating and shooting. The court denied Rizvi's request for sentence modification on the ground that Williams' sentence was not a new sentencing factor.

¶11 Rizvi appeals the order denying his post-conviction motion and his judgment of conviction.

DISCUSSION

¶12 We first address Rizvi’s argument that the circuit court erred in denying his post-conviction motion claiming ineffective assistance without holding a hearing, then turn to his argument regarding the denial of his motion to modify his sentence.

Ineffective Assistance

¶13 A circuit court must hold an evidentiary hearing to consider a post-conviction motion based on ineffective assistance of counsel if the motion alleges facts that, if true, would entitle the defendant to relief. *State v. Allen*, 2004 WI 106, ¶9, 274 Wis. 2d 568, 682 N.W.2d 433. Whether a motion meets that threshold is a question of law that we review de novo. *Id.*

¶14 To demonstrate that counsel’s assistance was ineffective, the defendant must establish both “that counsel’s performance was deficient and that the deficient performance was prejudicial.” *State v. Breitman*, 2017 WI 100, ¶37, 378 Wis. 2d 431, 904 N.W.2d 93 (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). We resolve this case based on the prejudice prong. *See id.* (“If the defendant fails to satisfy either prong [under *Strickland*], we need not consider the other.”). Whether any assumed deficient performance was prejudicial is also a question of law we review de novo. *See id.*, ¶39. “To establish that deficient performance was prejudicial, the defendant must show that ‘there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different,’” where “[a] reasonable probability is a

probability sufficient to undermine confidence in the outcome.” *Id.* (quoted source omitted).

¶15 Rizvi argues that his post-conviction motion alleged facts that, if true, demonstrate that his trial counsel was deficient and that this deficiency prejudiced Rizvi. To repeat, Rizvi alleges that trial counsel was prejudicially deficient for failing to call Owens, who would have undermined Thornton’s credibility, and for failing to more “effectively” cross examine the detective regarding police acceptance of Thornton’s version of events without ever following up with witnesses such as Owens. Rizvi argues that these failings were prejudicial because they prevented Rizvi from (1) properly challenging the credibility of key State witness Thornton, and (2) illustrating the “slopp[iness]” and “tunnel-vision” of police.

¶16 We now provide additional background, necessary to place in proper context Rizvi’s arguments about Owens-related evidence, before we explain why we are not persuaded by Rizvi’s ineffective assistance argument. Police found T.D. one night near Rizvi’s store, after he had been beaten and shot. Bystanders informed police that T.D. had sustained the injuries at the store, but when officers went to the store later that night, it was closed and it appeared that no one was present there. Officers returned to the store the next day, where they found and apprehended store employee Thornton. Thornton possessed a gun that would later be identified by a firearms expert as the gun used to shoot T.D.

¶17 Police questioned Thornton the day after his arrest. Thornton eventually told a detective that Rizvi and another store employee, Williams, had been involved in beating T.D. with a gun and that, after the beating, Rizvi and

Williams took T.D. to the alley behind the store, where Rizvi shot T.D. in the head.

¶18 T.D. underwent multiple surgeries to treat his gunshot wound, but also to remove an unrelated brain cyst discovered during his treatment for the gunshot wound. Between these procedures, T.D. received sedatives that initially prevented law enforcement from discussing the shooting with him. Eight days after the shooting, the same detective who took Thornton's statement interviewed T.D. T.D. reviewed photo arrays and gave a full statement. T.D. told the detective that Williams and Rizvi participated in the beating and that this included Rizvi striking T.D. with a gun, including in the head. T.D. also identified Rizvi as the shooter.

¶19 At trial, the detective testified regarding the procedures she used in having T.D. review three separate photo arrays, each including a photo of either Thornton, Williams, or Rizvi. The detective further described the substance of her interview of T.D. Key aspects of Thornton's trial testimony directly overlapped with, or were at least consistent with, T.D.'s statement to the detective. The following are significant examples:

- T.D. arrived at the store and demanded money from Rizvi that T.D. claimed Rizvi owed him. Williams then put T.D. in a chokehold and pulled T.D. into another room. Rizvi then directed Thornton to take over the register for him.
- Rizvi went into the back room, and Thornton heard "slapping of skin" consistent with T.D.'s statement that Rizvi joined Williams in punching and kicking T.D.
- Rizvi made a comment about T.D. making too much noise and threatened to "cut" T.D.

- Rizvi displayed a gun, and made noises consistent with T.D.’s statement that Rizvi struck T.D. with the gun, including in the head.
- As Thornton was walking away from the scene, he saw Rizvi and Williams dump an apparently unconscious T.D. in an area behind the store. This was consistent with T.D.’s statement that T.D. awoke in the area behind the store and that Thornton was not present for the shooting.
- T.D. started to run away and Rizvi shot him.

¶20 Thornton testified that, when he arrived at the store the day after the beating and shooting, another store employee, Owens, gave Thornton a gun, saying that he was doing so based on orders of “the boss man.”

¶21 The following are highlights of Rizvi’s different account in testimony at trial. Rizvi did not participate in the beating or shooting of T.D., and he did not hear anyone being beaten or any gunshots near the store on the night at issue. T.D. and Thornton got into arguments when they were both working in the store, and T.D. blamed Thornton for Rizvi terminating T.D.’s employment. Friction between Thornton and T.D., with T.D. insisting that Thornton owed T.D. money, led to one physical altercation between the two men a few days before the shooting and another altercation on the day of the shooting itself. Williams broke up the second altercation by restraining T.D. and pulling him into a back room, with Thornton following the two men into the back room. Rizvi went into the back room, where he found Williams holding T.D. Thornton was threatening and yelling at T.D. Rizvi first convinced Thornton, then T.D., to separately leave the store without further incident. T.D. did not appear bloodied or bruised when he left the store. Concerned that T.D. and Thornton might return to renew their conflict, Rizvi closed the store early and left for the night.

¶22 In the affidavit Rizvi submitted with his post-conviction motion, Owens averred the following. On the day after the shooting, Owens was working

at Rizvi's store when police officers arrived and arrested Thornton. Owens' contact with law enforcement during this encounter was minimal, and he was not later contacted by police concerning the case, including after Thornton told police that Owens had given Thornton a gun. Owens' affidavit further averred, contrary to Thornton's testimony, that Rizvi did not give Owens a gun, Owens did not give Thornton a gun, and Rizvi did not instruct Owens to give Thornton a gun. Owens averred that he had seen Thornton carrying a gun on one occasion before Thornton's arrest.

¶23 Rizvi argues that if Owens had testified to the above, the defense could have presented Owens as a disinterested third party who contradicted Thornton on a critical point, and this would have undermined Thornton's credibility. Specifically, Rizvi contends that the jury could have determined, based on Owens' testimony, that Thornton was lying about how he came to possess the gun used to beat and shoot T.D., and from this further infer that other aspects of Thornton's testimony were false. Rizvi argues that damaging Thornton's credibility in this way would have had a profound effect because Thornton's testimony was critical to corroborating T.D.'s confusing and sometimes inconsistent testimony. This is particularly so, according to Rizvi, because Thornton and T.D.'s testimony was the only substantive evidence of Rizvi's guilt.

¶24 We now explain why we conclude that Rizvi fails to allege facts that, if true, demonstrate that he was prejudiced by his trial counsel's alleged deficiencies. To begin, Rizvi does not dispute that Owens' averments could have had only an indirect effect on Thornton's credibility in testifying about the critical events. That is, Owens did not purport to have evidence bearing directly on T.D.'s beating or shooting. Rather, Owens' potential testimony involved only a

refutation of a portion of Thornton's testimony narrowly focused on how the gun came into Thornton's possession the day after the beating and shooting. Rizvi fails to come to grips with the strength of T.D. and Thornton's independent and mutually corroborating testimony and pre-trial statements, which Owens' potential testimony did not contradict or directly undermine. As the State persuasively details, and as summarized in part above, Thornton's testimony, T.D.'s statement to police, and T.D.'s testimony were closely aligned.

¶25 It is true, as Rizvi points out, that there were numerous inconsistencies in Thornton and T.D.'s trial testimony. To cite one notable example, T.D. testified that Thornton participated in T.D.'s beating, contrary to what T.D. told the detective and Thornton's testimony. Further, T.D.'s testimony was, at times, internally inconsistent and seemingly difficult to follow, apparently due to memory problems that he acknowledged were related to his head injuries and cyst. For example, T.D. testified on direct examination that he could not recall being shot, but on cross-examination he testified that he saw Rizvi shoot at him, as he had told the detective.

¶26 Ultimately, however, the accounts of Thornton and T.D. were notably consistent on the crucial question of whether Rizvi was present during the beating and shooting, something Rizvi categorically denied. That is, there is no reason to think that adding Owens' potential testimony would have made it more likely for jurors to believe that T.D. could not remember, or testified falsely, that Rizvi was present and participated in some manner. Because Rizvi denied being present, we are confident that, regardless of Owens' assertions, the jury would have been persuaded that Rizvi was lying about not being present. And, if the jury found that Rizvi was lying about that, we are confident that the verdicts were not affected by the absence of Owens' testimony. Thus, whatever the individual

weaknesses of their testimony, Thornton and T.D. together were able to provide compelling evidence that Rizvi was directly involved in T.D.'s beating and was the shooter.

¶27 Moreover, the State presented evidence supporting the view that it would have been difficult for Thornton and T.D. to have schemed to give a single, false account to police and unlikely that police persuaded T.D. to adopt Thornton's version of events. This included testimony by the detective regarding the circumstances of T.D.'s identifying Rizvi as one of his assailants and concerning T.D.'s inability to communicate with Thornton due to T.D.'s adverse medical condition during pertinent times. Similarly, the jury heard testimony from T.D.'s mother, who was present for his statement to the detective, that the detective did not "feed" answers to T.D. and did not tell T.D. what anyone else had said about the incident.

¶28 Notably, Owens' potential testimony would not corroborate the bulk of Rizvi's testimony or conflict with a finding that Rizvi, perhaps in *addition* to Thornton, participated in beating T.D. And, assuming that Owens' potential testimony would have undermined Thornton's credibility to a degree, it would not have undermined T.D.'s statement and testimony.

¶29 Rizvi alleges that the failure of defense counsel to call Owens further prejudiced Rizvi because it undermined the defense theory that the investigation suffered from "tunnel-vision" that was fixated on Rizvi, and was "sloppy, shortsighted, and rushed." In the same vein, he contends that it was prejudicially deficient performance for trial counsel to fail to cross examine the detective regarding the detective's failure to follow up with Owens on the topic of Thornton's claim that Owens had given Thornton the gun on Rizvi's orders.

However, the State points out that trial counsel did cross examine the detective about the failure of police to follow up with Owens regarding Thornton's version of events, and that counsel raised this point during closing argument, as part of what counsel argued were shortcomings of the investigation. The State contends that Rizvi cannot show that a reasonable probability of a different outcome would occur based on Rizvi's counsel failing to more "effectively" do something that counsel did in fact do. In his reply brief, Rizvi does not address the State's contentions on this topic.

¶30 In sum, we conclude that Rizvi fails to allege facts that, if true, demonstrate that he was prejudiced by his trial counsel's alleged deficiencies and therefore it was not error for the circuit court to deny Rizvi's motion without an evidentiary hearing.

Modification of Sentence Based on a New Factor

¶31 Rizvi asserts that a sentence imposed in another, related case is a new factor justifying sentence modification in this case. However, Rizvi does not even begin to develop a new factor argument. He merely mentions selected facts relating to the other sentence, without having created the sort of record that might support the argument he purports to make. We conclude that Rizvi fails to meet his burden to show that the other sentence is a new factor justifying sentence modification.²

² Rizvi makes a similar assertion regarding another alleged new factor that does not constitute a developed argument. Specifically, Rizvi alludes to the fact that he received a sentence in a separate case from this one, following his conviction for threatening the detective testifying in Rizvi's trial in this case. *See* WIS. STAT. § 940.203(2) (criminalizing intentionally threatening a law enforcement officer in response to officer's official acts). Rizvi asserts that the

(continued)

¶32 Circuit courts have inherent power to, in their discretion, modify sentences based on a defendant’s showing of a “new factor.” *State v. Harbor*, 2011 WI 28, ¶36, 333 Wis. 2d 53, 797 N.W.2d 828. A new factor is “a fact or set of facts highly relevant” to the sentencing, “but not known to the [sentencing court] at the time of original sentencing, either because it was not then in existence or because, even though it was then in existence, it was unknowingly overlooked by all of the parties.” *Id.*, ¶40 (quoted source omitted). Whether a set of facts constitutes a new factor is a question of law, and the defendant has a burden to demonstrate existence of a new factor by clear and convincing evidence. *Id.*, ¶¶33, 35.

¶33 Rizvi asserts that it is a new sentencing factor that Williams, who unlike Rizvi had a prior criminal history, received a shorter prison sentence for Williams’ involvement in T.D.’s beating and shooting than Rizvi did for his involvement.³ Rizvi points to the difference in the sentences, and then argues that this disparity is a new factor because Williams was convicted of attempted first degree homicide, and Rizvi was not convicted of that offense.

¶34 However, Rizvi fails to develop any argument that Williams’ sentence is “highly relevant” to Rizvi’s sentencing, or that the disparity here shows that Rizvi’s sentence was not based upon Rizvi’s individual culpability and

threat-based sentence is a new factor, but we cannot discern what he intends to argue along these lines, and we reject the argument on that basis.

³ Specifically, Williams was sentenced to 10 years of initial confinement and 5 years of extended supervision for attempted first degree intentional homicide using a dangerous weapon, as a party to the crime. *See* WIS. STAT. §§ 939.32(1)(a), 939.50(3)(a), 940.01(1). Rizvi was sentenced to a total of 15 years of confinement and 6 years of extended supervision for his 2 counts of conviction, to be served consecutively.

rehabilitative needs. *See State v. Toliver*, 187 Wis. 2d 346, 361-62, 523 N.W.2d 113 (Ct. App. 1994) (“A mere disparity between the sentences of co-defendants is not improper if the individual sentences are based upon individual culpability and the need for rehabilitation.”), *clarified on other grounds by Harbor*, 333 Wis. 2d 53, ¶¶48-52 (proving existence of new factor does not require factor to “frustrate the purpose of the original sentence”). Putting aside other shortcomings in Rizvi’s argument, we note that the record in this case does not contain details regarding Williams’ case and, specifically, does not reflect all aggravating and mitigating facts pertinent to Williams’ sentence. It would be a first step in Rizvi’s new factor argument to have developed the record and then presented analysis of those details.

CONCLUSION

¶35 For these reasons, we reject Rizvi’s arguments that the circuit court erred in denying his post-conviction and sentence modification motions without a hearing and affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

